

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

EFRAIN GONZALEZ,
Plaintiff,

vs.

YEN JING ENTERPRISES, INC. AND
SHENG-HO PENG,
Defendants.

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CIVIL ACTION H-05-4309

MEMORANDUM AND RECOMMENDATION

Plaintiff Efrain Gonzalez filed this action on December 20, 2005, asserting violations of the Fair Labor Standards Act (FLSA) and seeking to recover unpaid minimum wages, overtime pay, liquidated damages, attorneys' fees, and costs. Gonzalez now moves for default judgment (Dkt. 8) against defendants Yen Jing Enterprises, Inc. and its president and owner Sheng-Ho Peng (collectively Yen Jing). Having considered Gonzalez's motion, the court recommends that default judgment be entered in his favor against defendants.

1. Entry of Default

Gonzalez has presented evidence that defendants Yen Jing Enterprises, Inc. and Sheng-Ho Peng were served through personal service on December 21, 2005. Returns of service for both defendants were filed with the court on December 29, 2005. As of the date of this Order, Yen Jing Enterprises, Inc. and Sheng-Ho Peng have not filed answers or otherwise responded to the complaint. Pursuant to Federal Rule of Civil Procedure 55(a), Yen Jing Enterprises, Inc. and Sheng-Ho Peng are in default.

2. Default Judgment for Damages

Gonzalez has submitted evidence of his damages. Gonzalez has submitted an Affidavit stating that he was employed by Yen Jing Enterprises, Inc. between June 2003 and May 2004. His duties consisted of distributing fliers at apartment complexes and working in the kitchen of a restaurant washing dishes, chopping vegetables, and deep-frying food. Gonzalez states that he regularly worked for Yen Jing seventy hours per week for 49 weeks for an average bi-monthly wage of \$425. During the period of his employment, Gonzalez worked 3,430 hours, of which 1,470 were overtime hours. Yen Jing did not maintain time records. Because Yen Jing has not presented any evidence of the actual hours Gonzalez worked, the court accepts Gonzalez's estimate of his hours for purposes of determining his damages. *Donovan v. Hamm's Drive-Inn*, 661 F.2d 316, 318 (5th Cir. 1981).

The FLSA requires employers to pay a minimum wage of \$5.15 per hour, 29 U.S.C. § 206, plus overtime of one and one half times the employee's regular rate of pay, 29 U.S.C. § 207. Yen Jing regularly paid Gonzalez the equivalent of \$2.80 per hour.¹ Thus, Yen Jing owes Gonzalez the difference between \$5.15 and \$2.80 (\$2.35) for each of the 3,430 hours he worked, for total back minimum wages of \$8,060.50.

Yen Jing was required to pay Gonzalez overtime of one and one half times Gonzalez's regular rate of pay for hours he worked in excess of 40 in a workweek. Because Yen Jing failed to pay Gonzalez minimum wage, Gonzalez's regular rate of pay for determining his

¹ Calculated as follows: \$425 (Gonzalez's bi-monthly wages) times 24 (the number of pay periods per year), divided by 52 (the number of weeks in a year), divided by 70 (the number of hours Gonzalez worked per week). See 29 C.F.R. § 778.113(b).

overtime rate is \$5.15 per hour. 29 C.F.R. § 778.113(b). Gonzalez is entitled to an overtime premium of 50% of his regular rate, or \$2.58, for each overtime hour he worked. *See Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138-39 (5th Cir. 1988). Gonzalez worked 1,470 overtime hours, and thus is entitled to an overtime award of \$3,792.60.²

Under the FLSA, an employee who proves a violation is entitled to liquidated damages in an amount equal to his unpaid minimum and overtime wages unless the employer can show that it acted in good faith and with objectively reasonable grounds for believing its actions did not violate the FLSA.. 29 U.S.C. § 260. Defendants have presented no evidence to overcome an award of liquidated damages. Thus, Gonzalez is entitled to recover liquidated damages in the amount of \$11,853.10.

The FLSA also provides for recovery of reasonable attorneys' fees and costs by a prevailing plaintiff. 29 U.S.C. § 216(b). Gonzalez has presented evidence that his attorneys' fees to date total \$4,473.80 and his costs total \$382.78. The court finds these sums reasonable. Gonzalez is entitled to judgment in these amounts.

3. Conclusion

Because the requirements of Rule 55(a) are met and Gonzalez has proven his damages, the court recommends that Gonzalez be granted a default judgment against

² Gonzalez seeks \$11,363.10 as overtime compensation, calculated by multiplying the number of overtime hours by 1.5 times the regular rate of \$5.15 per hour (1,470 hours x \$7.73 per hour = \$11,363.10). This calculation improperly duplicates the minimum wage award described above, which insures that Gonzalez is paid the minimum wage of \$5.15 for all hours worked, including overtime hours. Allowing Gonzalez to recoup another \$5.15 for these same overtime hours, in addition to the overtime premium, would amount to a double recovery.

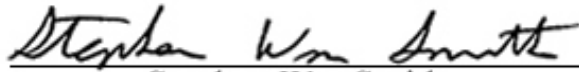
defendants, jointly and severally, in the total amount of \$28,562.78.

The clerk is directed to mail a copy of this Memorandum and Recommendation to defendants at the last known address of Sheng-Ho Peng, the registered agent of Yen Jing, at 8334 Mentmore Drive, Spring, TX 77379.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Defendants are notified that failure to timely file objections to this Memorandum and Recommendation will result in entry of judgment against them in the amounts described above.

Signed at Houston, Texas on October 20, 2006.



Stephen Wm Smith
United States Magistrate Judge